Office-Supreme Court, U.S.
FILED
NOV 23 1982
ALEXANDER L. STEVAS,
CLERK

DEC 3 PAGE 7

No. 82-5528

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JANICE BUTTRUM,

Petitioner,

-vs-

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

WILLIAM B. HILL, JR.
Senior Assistant Attorney General

132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

Counsel for Respondent
State of Georgia

MARGERY MALKIN KOOSED
Associate Professor of Law

The University of Akron
School of Law
Akron, Ohio 44325
(216) 375-6793

Counsel for Petitioner
Janice Buttrum

SUPPLEMENTAL QUESTION PRESENTED

DOES INTRODUCTION OF EVIDENCE OF A NON-STATUTORY AGGRAVATING CIRCUMSTANCE AND CONSIDERATION OF SUCH EVIDENCE IN IMPOSING THE DEATH PENALTY OFFEND THE EIGHTH AND FOURTEENTH AMENDMENTS?

ARGUMENT

In its Brief in Opposition, the Respondent, State of Georgia, submits that expert testimony as to future dangerousness is properly admissible in Georgia sentencing proceedings as a non-statutory aggravating circumstance. (Brief in Opposition, pages 8 to 12.)

Although the Petitioner's Questions Presented did not explicitly raise the issue of whether Georgia's practice of permitting expert witness testimony as to future dangerousness denied her rights under the Eighth and Fourteenth Amendments because it was evidence of a non-statutory aggravating circumstance, the State of Georgia has argued the issue, and Petitioner would contend it is "a subsidiary question fairly included" in the Questions Presented. Rule 21.2(a) of Rules of Supreme Court. Petitioner would thus respectfully ask this Court to consider as part of the First Question Presented this subsidiary supplemental question: Does the Introduction of Evidence of a Non-Statutory Aggravating Circumstance and Consideration of Such Evidence in Imposing the Death Penalty Offend the Eighth and Fourteenth Amendments?[1/]

Respondent's contention that evidence as to statutory aggravating circumstances may be introduced and relied upon by the sentencer has been soundly rejected by two Circuit Courts, and contrary to Respondent's assertion, this Court has not held that this practice is constitutional.

Decisions of the Fifth and Eleventh Circuits demonstrate that reliance upon non-statutory aggravating circumstances

---

[1/] Petitioner has adequately preserved this issue, as Respondent's argument would indicate. The trial counsel repeatedly objected to Dr. Adams' testimony as "irrelevant in a sentencing/aggravation phase." (A-24, A-27 to A-28, A-29, A-30 to A-31.) The trial court overruled the "objection to the whole of the witness's testimony as being irrelevant." (A-32.)

is a violation of the Eighth and Fourteenth Amendments as it increases the risk that the death penalty is imposed in an arbitrary and capricious manner. *Henry v. Wainwright*, 661 F. 2d 56 (5th Cir., 1981), vacated on other grounds, ___ U.S. ___, 102 S. Ct. 2922, 73 L.Ed. 2d ___ (1982), *aff'd.*, 686 F. 2d 311 (1982). *Proffitt v. Wainwright*, 685 F. 2d 1227 (11th Cir., 1982) is particularly pertinent to the case at bar, as there the Eleventh Circuit concluded that admission of evidence of "a propensity to commit the crime for which (Proffitt) was convicted" was a denial of the Eighth and Fourteenth Amendments as such evidence bore "no resemblance to any of the statutory aggravating factors." *Id.*, at 1266.

The Brief in Opposition contends that this Court's awareness in *Gregg v. Georgia*, 428 U.S. 151 (1976) of the ability under Georgia's sentencing statutes to admit non-statutory aggravating evidence forecloses any argument on this issue at this time. However, as this Court stated in *Zant v. Stephens*, ___ U.S. ___, 102 S. Ct. 1855, 1857 (1982):

> "Our review [in *Gregg*] of the statute did not lead us to examine all of its nuances. It was only after the state law relating to capital sentencing was clarified in concrete cases that we confronted and addressed more specific constitutional challenges in *Coker v. Georgia*, 433 U.S. 584 (1977) . . . ; *Presnell v. Georgia*, 439 U.S. 14 (1978) . . . ; *Green v. Georgia*, 442 U.S. 95 (1979) . . . ; and *Godfrey v. Georgia*, 446 U.S. 420 . . . (1980).

Furthermore, Justices Marshall, Brennan, and Powell have expressed views in *Zant v. Stephens*, *supra* at 1858-1865, inconsistent with this argument of the State of Georgia.

This issue clearly is not foreclosed, and it is Petitioner's understanding that the Court has just granted review to *Barclay v. Florida*, #81-6908, ruling below, 343 So. 2d 1286 (Fla. 1977), *cert. granted*, November __, 1982, which raises at least similar issues.

Resolution by this Court of *Barclay* and *Zant v. Stephens* will assist in determining Petitioner's issue, but not necessarily be dispositive. The Respondent herein makes the same contention which the Georgia Supreme Court may have presented in its answer to the certified question in *Zant v. Stephens*, No. 38763 (decided Oct. 27, 1982), that non-statutory aggravating circumstances are generally admissible. As earlier stated, Petitioner contends this conclusion is totally inconsistent with this Court's requirement of clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a death sentence. *Godfrey v. Georgia*, 446 U.S. 420 (1980). How can "measured, consistent application" *Eddings v. Oklahoma*, ___ U.S. ___, 102 S. Ct. 869, 879 (1982) of the death penalty be achieved if the aggravating circumstances considered may vary from one capital sentencing hearing to another? If there were some control from a state statute, or at the least, judicial decision, perhaps discretion would be adequately guided. This is where Petitioner's case varies from that of *Zant v. Stephens*.

The Georgia Supreme Court answer in *Zant v. Stephens* may be narrowly read as relying on the fact that evidence of prior convictions is specifically enumerated in § 27-2503 as admissible in the sentencing hearing. The Georgia Court states:

> ". . . [E]vidence of Stephens' prior record was admissible aside from any relevance it had to the invalid gound of (b)(1), Code Ann. 27-2503 . . . . A different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was not otherwise admissible, and thereafter the circumstance failed." *Zant v. Stephens*, No. 38763, at p. 6-7 (Oct. 27, 1982).

If the Georgia Supreme Court decision is read in this limited fashion, the State may argue that perhaps sufficiently

consistent guidance can be expected to be achieved to permit Stephens' death sentence to be upheld. In Petitioner's case, however, the expert prediction of future dangerousness evidence argued by Respondent to be admissible as a non-statutory aggravating circumstance is not identified as generally admissible in § 27-2503. Thus, no guidance to sentencing bodies has been provided through the statutory mechanism.[2/]

Alternatively, if the Georgia Supreme Court had specifically approved a defendant's future dangerousness as an appropriate aggravating factor, the State could possibly argue that through this mechanism, the requisite guidance may be achieved. But the Georgia Supreme Court's review of death sentences does not generally appear to be creating any "list" of permissible non-statutory aggravating circumstances. Further, the Georgia Court is not conveying such information to juries, so that they are "given guidance regarding the factors about the crime and the defendant that the State . . . deems particularly relevant to the sentencing decision." *Gregg*, at 192. This, at the very least, is essential if reasonably consistent application by juries is to be approached.

This is another point of distinction between *Stephens* and the Petitioner's case. The Georgia Supreme Court has announced that prior convictions may be considered in aggravation. *Gates v. State*, 244 Ga. 587, 261 S.E. 2d 349 (1979). Petitioner can find no such explicit ruling regarding future dangerousness.

[2/] Further, Petitioner would argue that the Georgia Supreme Court's purported "different" case where the evidence may "otherwise" be "inadmissible" is actually the Petitioner's. Petitioner has argued throughout that the expert witness prediction testimony herein should not be admissible, as it is too unreliable and of questionable relevancy to the sentencing decision. *Petition*, at 6-9.

CONCLUSION

This Court has granted review in *Barclay* apparently to reach the issue of Florida's practice of considering non-statutory aggravating circumstances. While *Zant v. Stephens* may address this issue for Georgia, it is possible that as prior convictions are set forth as properly admissible evidence in § 27-2503, this Court's treatment of the issue may be affected.

The Attorney General has conceded that future dangerousness is a non-statutory aggravating circumstance, and Petitioner contends no additional guidance is provided the sentencer by Georgia capital sentencing statutes or by judicial decision. Petitioner requests that her Petition be granted to assure that Georgia capital defendants receive a full resolution of this significant constitutional issue.

Petitioner further contends that the Questions Presented in her original Petition are substantial constitutional questions deserving of this Court's review. Petitioner believes her Argument in support of the Petition adequately refutes the Respondent's claims of compliance with the Fourteenth and Eighth Amendments.

For all the reasons stated, the Petitioner prays that the writ of certiorari be issued.

Respectfully submitted,

Margery Malkin Koosed
MARGERY MALKIN KOOSED

Associate Professor of Law
The University of Akron
School of Law
Akron, Ohio 44325
(216) 375-6793

Counsel for Petitioner
Janice Buttrum

CERTIFICATE OF SERVICE

I, Margery Malkin Koosed, a member of the Bar of the Supreme Court of the United States and counsel of record for the Petitioner, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Reply and Supplemental Brief for the Petitioner by depositing it in the United States mail, with proper address and adequate postage to:

William B. Hill, Jr.
Senior Assistant Attorney General
132 Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

this 19th day of November, 1982.

Margery Malkin Koosed
MARGERY MALKIN KOOSED
Counsel for Petitioner
Janice Buttrum